Supreme Court, U.S.
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No. [illegible]

In The
Supreme Court of the United States
October Term, 1993

A.J. ARAVE, WARDEN,

Petitioner,

vs.

ALBERT RAY BEAM,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LARRY ECHOHAWK
Attorney General of Idaho

LYNN E. THOMAS
Deputy Attorney General
Statehouse
Boise, Idaho 83720
Telephone: (208) 334-2400

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

MAP 18

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Ninth Circuit impermissibly limited the applicability of a procedural bar to habeas review of a death sentence by holding that the Idaho Supreme Court implicitly considered an Eighth Amendment issue not presented to it.

2. Whether the Court of Appeals for the Ninth Circuit failed to accord the presumption of correctness mandated by 28 USC § 2254(d) to a state court judgment by holding that the state sentencing judge arbitrarily applied the defendant's sexual history to the sentencing decision.

3. Whether the Court of Appeals for the Ninth Circuit improperly devised a "new rule" and applied it retroactively in violation of *Teague v. Lane*, 489 U.S. 288 (1989) by holding that a sentencing court may not consider aspects of a defendant's sexual history and by holding that certain sexual behavior is within the protection for primary private conduct afforded by an exception to the non-retroactivity doctrine of *Teague*.

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PETITION FOR WRIT OF CERTIORARI

A. J. Arave, warden of the Idaho Maximum Security Institution, who is custodian of Respondent Albert Ray Beam, petitions for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, which granted federal habeas corpus relief to a prisoner sentenced to death on the ground that the sentencer's consideration of aggravating factors was tainted by an incorrect view of Beam's "sexual history."

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993). A copy of the opinion is appended to this petition.

JURISDICTION

The opinion of the Court of Appeals was filed September 2, 1993, and amended November 16 and December 6, 1993. A petition for rehearing and suggestion for hearing *en banc* were denied December 6, 1993.

This case arose under 28 U.S.C. § 2254. Petitioner invokes the jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the Constitution of the United States, provides in pertinent part:

> " . . . nor cruel and unusual punishment inflicted."

Title 28, § 2254(a) United States Code, provides, in pertinent part:

> [A] circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Title 28, § 2254(d) United States Code, provides, in pertinent part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct . . .

Idaho Code § 19-2515 provides, in pertinent part:

> (c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory

aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

* * *

(e) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting fourth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detain in writing its reasons for so finding.

(f) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(g) The following are statutory aggravating circumstances, at lease one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

(5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(6) By the murder, or circumstances surrounding its commission, the defendant exhibits utter disregard for human life.

. . .

(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which

will probably constitute a continuing threat to society.

Idaho Code § 19-2827 (c) provides as follows:

(c) With regard to the sentence the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

Idaho Code § 19-2719 provides, in pertinent part:

(3) Within forty-two (42) days of the filing of the judgment imposing the punishment of death, and before the death warrant is filed, the defendant must file any legal or factual challenge to the sentence or conviction that is known or reasonably should be known.

(4) Any remedy available by post-conviction procedure, habeas corpus or any other provision of state law must be pursued according to the procedures set forth in this section and within the time limitations of subsection (3) of this section.

(5) If the defendant fails to apply for relief as provided in this section and within the time limits specified, he shall be deemed to have

waived such claims for relief as were known, or reasonably should have been known. The courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief.

(6) In the event the defendant desires to appeal from any post-conviction order entered pursuant to this section, his appeal nust be part of any appeal taken from the conviction or sentence. All issues relating to conviction, sentence and post-conviction challenge shall be considered in the same appellate proceeding.

. . .

(10) When the procedures specified in this section and section 19-2827, Idaho Code, have been carried out and a remittitur issued, and an execution date set as provided by law, the defendant shall be deemed to have exhausted all state remedies.

STATEMENT OF THE CASE

On remand from this court, *Arave v. Beam*, 113 S.Ct. 1137 (1993) the United States Court of Appeals for the Ninth Circuit for the second time set aside the death sentence imposed on the respondent, Albert Ray Beam, on the ground that the sentencing court had arbitrarily *applied* state statutory aggravating factors. The alleged arbitrariness on which the decision of the Court of Appeals decision was based was described in the court's opinion, written by the Honorable Steven Reinhardt, as "a determination that Beam's prior sexual history, consisting exclusively of non-violent, consensual or involuntary

conduct, provides a valid penological basis for separating him from other capital defendants and placing him in a small group for which death is appropriate." App. at 32. This characterization, which bears no reasonable resemblance to the state court's actual findings, was supplemented by the Court of Appeals' *sua sponte* determination that the state trial judge was ideologically out of touch with modern views of sexual behavior. The Court concluded that the state sentencing judge the Honorable Edward J. Lodge, had linked Beam's "sexual history" to the death sentence because "of [his] arbitrary pre-conceived attitudes." App., at 36. According to Judge Reinhardt, "it goes without saying that society has abandoned its earlier belief that homosexuality presents a danger to the community. It should also go without saying that victims of incest may not be further punished by making their misfortune the basis for their subsequent execution." App. at 37. This near-fantasy version of what happened in the state courts compels a detailed description of the sentencing court's findings and the facts on which they were based. It should also be pointed out that the issue was not presented to the Court of Appeals by *either* of the parties.

On March 19, 1984, Albert Ray Beam was sentenced to death for the murder of a thirteen-year-old girl, Mondi Lenten. An accomplice, Michael Shawn Scroggins, also received a death sentence for the crime.[1] Beam's conviction and sentence were affirmed on review by the Idaho Supreme Court, *State v. Beam*, 710 P.2d 526 (Idaho 1985),

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[1] Scroggins' death sentence was later reduced by the Idaho Supreme Court. *State v. Scroggins*, 716 P.2d 1152 (Idaho 1985).

reh'g denied (1985), and this Court denied Beam's petition for a writ of certiorari. *Beam v. Idaho*, 476 U.S. 1153 (1986).

Although Beam and Scroggins sought to blame each other for the offense, Beam's own testimony was a significant factor in the case against him and was described by the Idaho Supreme Court:

> Beam testified to the following account of the crime. The three of them walked to a back yard and stopped near a tree. Scroggins had a pair of handcuffs, which he used to manacle the victim and then had oral, vaginal and anal sex with her. Beam then had sexual intercourse with the victim. The handcuffs were removed so she could dress and then replaced on her wrists. Beam and Scroggins then walked the victim toward a drainage ditch, during which time Scroggins twice told the victim they were going to kill her. The victim pleaded with them to let her go and then fell into the stream. Scroggins shoved her head under the water, then pulled her out and slit her throat. Beam then held her head under water until she stopped moving. Her body was left in the stream. 710 P.2d at 528.

A pathologist testified that death was attributable to drowning.

The death sentence imposed on Beam was founded on the trial court's determination that three statutory aggravating circumstances had been proved beyond reasonable doubt: (1) the murder was especially heinous, atrocious and cruel, manifesting exceptional depravity, Idaho Code § 19-2515(g)(5), (2) in committing the murder, Beam had exhibited utter disregard for human life, Idaho

Code § 19-2515(g)(6) and (3) Beam had exhibited a propensity to commit murder which would constitute a continuing threat to society, Idaho Code § 19-2515(g)(8). *Beam*, 710 P.2d at 529. These findings were the products of substantial information presented to the sentencing court about the nature of the crime and the offender, some of it aggravating, some of it mitigating.

A presentence report explored Beam's personal background and revealed "that Beam abused drugs, was on parole for burglary when the murder was committed, had been exposed to and participated in much sexually deviant behavior, had tortured animals, was impulsive, and lacked any adequate conscience." *State v. Beam*, 710 P.2d at 529.

The state sentencing judge took Beam's "sexual history" into account in two contexts: (1) he found as a *mitigating* circumstance that the "defendant was raised in a turbulent family setting that included alcohol and drug abuse, sexual deviancy, and educational deprivation," and (2) he remarked on Beam's "sexual history" as part of the historical background for his conclusion that Beam showed no prospect for rehabilitation, a possible mitigating factor, because he had no inclination to conform to any social structure.[2] Specifically, Judge Lodge wrote:

> The prognosis for any substantive rehabilitation is non-existent.

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[2] The Court of Appeals mischaracterized the trial court's reference to Beam's sexual history, calling it a basis for applying an aggravating factor that was the product of "the Court's moral disapproval of Beam's sexual experiences." *Beam v. Paskett*, App. at 37.

> The psychological evaluation describes the defendant as a person who lacks an adequate conscience, who is impulsive, and who uses others to satisfy his own personal needs.
>
> Defendant has a long history of deviant sexual behavior, including incest, homosexuality, and abnormal sexual relationships with women both older and younger than the defendant.
>
> The report describes the defendant as one inclined to use poor judgment and who at times acts out his basic hostility by being abusive to both people and to animals. (See reports attached.) Findings of the Court, App. at 5.

Beam appealed his conviction to the Idaho Supreme Court and also participated in the state's mandatory death sentence review process. See Idaho Code § 19-2827. In his direct appeal, Beam claimed as error: (1) the alleged unconstitutionality of the death penalty statutes of the state of Idaho on several grounds, including (a) sentencing by a judge rather than a jury, and (b) arbitrary imposition of the death penalty based on the sex of the victim; (2) the asserted unconstitutionality of the provision of the Idaho Code that provides that mental condition is not a defense to any charge of criminal conduct; and (3) that the use of dual juries deprived him of due process of law. *State v. Beam, supra.* The Idaho Supreme Court rejected these claims of error. *Id.* Incident to its sentence review responsibility, the state supreme court also determined that the sentencer's findings were supported by the evidence. *Id.*; Idaho Code § 19-2827(c).

Thereafter, Beam filed a petition for post-conviction relief in which he alleged, among other things, that the

sentence was disproportionate to that to be served by his co-defendant, Michael Shawn Scroggins. Beam also argued that the district judge should have disqualified himself from presiding over the post-conviction proceeding and from ruling on the separate motion that Beam had filed for a reduction of sentence. Beam's post-conviction claims were rejected. *State v. Beam*, 766 P.2d 678 (1988), *reh'g denied* (1988).

At no time did Beam assert in the state courts that his "sexual history" had been used against him in violation of the Eighth Amendment.[3]

After his state conviction and sentence became final, Beam filed a petition for a writ of habeas corpus in the United States District Court for the District of Idaho. No issue was presented to the district court advancing the proposition that Beam's "sexual history" had been used against him in violation of the Eighth Amendment nor did Beam make the claim in the Court of Appeals. The Court of Appeals' decision invalidating Beam's sentence was Beam's sentence was vacated by this Court on a ground no longer related to the issues raised here. *Arave v. Beam, supra.*

On remand, the Court of Appeals considered whether the state sentencing judge acted properly in applying facts about Beam's background in finding that Idaho's "continuing threat" aggravating factor, Idaho

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[3] The first time this case was considered by the Court of Appeals, Beam also prevailed on a vagueness claim that had not been presented to the state courts. *Beam v. Paskett*, (*Beam I*) 966 F.2d 1563 (9th Cir. 1992). That issue was resolved by *Arave v. Creech*, 113 S.Ct. 1534 (1993).

Code § 19-2515(g)(8) was one of three circumstances that justified the death penalty. Although this issue had not been presented before, the Court of Appeals concluded that it could decide the question because Idaho's capital sentence review process, which imposes on the state supreme court an "affirmative duty to review the entire record in a capital case," required the inference that the state reviewing court had implicitly considered the question whether the sentencing judge arbitrarily connected Beam's "sexual history" to the death penalty.

Although the state sentencing court had held that each of the three aggravating factors it found was independently sufficient, when considered against all of the mitigating evidence presented, and would have caused the court to impose the death sentence on any of the statutory aggravating factors, the Court of Appeals held that this was not sufficient to save the death sentence. It concluded that the state court's reference to Beam's "sexual history" appeared "to be the product of the trial judge's arbitrary pre-conceived attitudes," App., at 36, that the state had thus used the death penalty "as a mechanism for enforcing societal norms regarding sexual activity," App. at 34,[4] and that the sentencer had found "in effect that an individual who has been the victim of incest, has engaged in homosexuality, and has had 'abnormal sexual relationships' " may be singled out for execution on the theory that he is a greater risk to society than most other first-degree murderers. App., at 32. The

[4] This is an odd view of what constitutes federal constitutional error given the fact that the state *is* entitled to "enforce societal norms regarding sexual activity," *Bowers v. Hardwick*, 478 U.S. 186 (1986) and may consider a defendant's unwillingness to observe its laws to be a factor relevant to issues of aggravation and mitigation.

court held that for two reasons *Teague v. Lane*, 489 U.S. 288 (1989), imposed no bar to the application of its new rule. Relying on the first exception to *Teague*, which allows retroactive application of new rules that forbid punishment of certain kinds of conduct, the court decided that Beam's sexual history was protected conduct, that the state court used this conduct to impose a death sentence and that *Teague* therefore allowed retroactive application of the new rule. App. at 38.

As an alternative rationale, the Court of Appeals posited the theory that it was not announcing a new rule but merely applying the old rule of *Herndon v. Lowry*, 301 U.S. 242 (1937) that "any limit upon individual liberty . . . must have 'an appropriate relation to the safety of the state.' " App. at 38, n.7.

The Ninth Circuit Court of Appeals issued its opinion on remand September 2, 1993 and amended it November 16, 1993 and December 6, 1993. The Warden's petition for rehearing and suggestion for hearing *en banc* were denied December 6, 1993.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE COURT OF APPEALS HOLDING THAT IT COULD REACH A PROCEDURALLY DEFAULTED ISSUE ON A THEORY THAT UNSTATED CONSTITUTIONAL QUESTIONS ARE IMPLICITLY CONSIDERED ON STATE DEATH PENALTY REVIEW EVADES THIS COURT'S PRECEDENT AND CONFLICTS WITH HOLDINGS IN OTHER FEDERAL CIRCUITS.

The holding of the Court of Appeals that the sentencer acted arbitrarily with respect to Beam's sexual history is unusual in that it was not a decision on a claim made by Beam in federal courts after omitting the claim in state proceedings. Beam did not make such a claim; the Court of Appeals raised the issue on its own motion. For this reason, the first question presented here involves both failure to exhaust state remedies and procedural default. Clearly, the Court of Appeals did not honor the requirement that the state courts be given an opportunity to consider and pass on federal constitutional issues. *Rose v. Lundy*, 455 U.S. 509 (1982). The court's "implicit finding" rationale is wholly inconsistent with this purpose. Because this unexhausted issue could no longer be raised in state court, it was procedurally defaulted under Idaho law. Idaho Code § 19-2719. *See also, Castille v. Peoples*, 489 U.S. 346 (1989); *Engle v. Isaac*, 456 U.S. 107 (1982); *United States ex rel. Sheppard v. Roth*, 762 F.Supp. 190 (N.D. Ill. 1991).

Shortly after the decision in *Barefoot v. Estelle*, 463 U.S. 880 (1983), in which this court expressed its interest in expeditious resolution of issues in capital cases, the Idaho legislature sought to prevent piecemeal litigation

of federal constitutional claims by the enactment of a statute requiring a prisoner sentenced to death to promptly litigate collateral issues which were known or reasonably should have been known prior to the time his direct appeal went to the Idaho Supreme Court. Idaho Code § 19-2719. The statute provides that issues not raised in accordance with its provisions are procedurally forfeited. Idaho Code § 19-2719(5)(10).

The requirement that specific issues be timely raised may not be satisfied by broad references. The Idaho Supreme Court has held that a litigant's "failure to support an assignment of error with argument and authority is deemed a waiver of the assignment." *State v. Burris*, 619 P.2d 1136, 1137 n.1 (Idaho 1980), *reh'g denied* (1980). The state is constitutionally entitled to enforce such procedural rules without interference from federal habeas courts. *See Coleman v. Thompson*, 111 S.Ct. 2546 (1991); *Sykes, supra*, (Adequate and independent state ground rule applies to federal habeas cases.).

Coleman v. Thompson, 111 S.Ct. 2546 (1991) points out that a procedural default of state remedies resulting in the lack of any remaining avenue by which federal claims could be raised in state courts may technically satisfy the exhaustion requirement of federal law. This does not, however, lead to the conclusion that a federal habeas court may consider the defaulted claims merely because state remedies had been exhausted with respect to such claims.

> [The concerns of the exhaustion doctrine] apply to federal claims that have been procedurally defaulted in state court. Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for

> presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. *Coleman*, 115 L.Ed.2d at 640.

To preserve the efficacy of state procedural bars, and to insure that deference is paid to state court judgments, the Court concluded in *Coleman* that it was inappropriate to apply the presumption of *Harris v. Reed* that "silent judgments" are based on consideration of federal claims on the merits. Accordingly, the Court held that the Virginia court's dismissal of Coleman's appeal appeared fairly to rest on state procedural law inasmuch as the dismissal order made no mention of federal law and was responsive to the Commonwealth's motion which was based solely on procedural grounds. 115 L.Ed.2d at 662-663.

In *Ylst v. Nunnemaker*, 501 U.S. ___, 111 S.Ct. 2590 (1991) the Court held that the presumption of *Harris v. Reed* in favor of federal review would be applied only after a specific finding that a state determination fairly appears to rest upon or to be interwoven with federal law. This approach precludes the assumption that merely because the dismissal of a state action was unexplained, the state court must have reached the merits of a federal claim and thereby opened the door to federal habeas review.

The Idaho Supreme Court has held that the preclusion statute, Idaho Code § 19-2719, will generally apply to prevent forfeited issues from being raised in successive petitions for post-conviction relief. *Paz v. State*, 852 P.2d 1355 (Idaho 1993), *reh'g denied* (1993); *Fetterly v. State*, 825 P.2d 1073 (Idaho 1992). Accordingly, the issue on which

the Court of Appeals based its decision was clearly forfeited in the state courts as a matter of state procedural law.

The Court of Appeals' response to this Court's procedural bar jurisprudence was that Beam had, in fact, raised the issue of the validity of the state's specific application of its aggravating factors statute by a general assertion that the Idaho *statute* was unconstitutionally arbitrary. It held further that there was no need for the state court to have expressly ruled on the issue because Idaho Supreme Court's obligation to review death sentences to determine whether they are proportional, non-arbitrary and just means that affirmance of a death sentence constitutes a ruling on the merits of underlying constitutional issues.

> Construed in light of the mandatory review provisions of § 19-2827, the Idaho Supreme Court's affirmance of Beam's death sentence necessarily included not only a determination that none of the claims being raised had merit but further that his sentence of death was not based on any arbitrary factor. As reliance upon a petitioner's past non-violent consensual or involuntary sexual conduct in violation of the Eighth Amendment would clearly constitute reliance on an arbitrary factor . . . the [Idaho Supreme] court "either explicitly or implicitly" concluded that the sentence in judge's application of the "continuing threat" aggravating factor did not violate the Eighth Amendment. Thus, here, as in *Ake* [*v. Oklahoma*, 470 U.S. 68 (1985)], application of the procedural bar depends upon an antecedent determination of federal law and does not

> constitute an independent and adequate state ground. *Beam*, App. at 29-30.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court held that a criminal defendant who did not raise a constitutional issue in state court, as he was required to do by state procedural rule, was not entitled to federal habeas review of that issue absent a showing of cause and prejudice. The Court of Appeals, by concluding that the state's mandatory review process implicates all constitutional issues, express or implicit, found that the Idaho Supreme Court had ruled on the merits of an issue that was (1) not briefed or argued to the state by any party, (2) could not be raised because it had been forfeited under state procedural rules, and (3) was never addressed by the Idaho Supreme Court. Although the Court of Appeals believed otherwise, this Court has made clear that the failure of a state court to explicitly mention a particular constitutional claim precludes a holding that the state court resolved the issue on the merits:

> Petitioner does not attempt to show cause for his default. Instead, he argues that the claim was not barred because it was addressed by the Illinois Appellate Court. [citation omitted] We cannot agree with the Petitioner's argument. The Illinois Appellate Court rejected petitioner's Sixth Amendment fair/section claim *without* mentioning the equal protection clause on which *Swayne* was based or discussing whether *Swayne* allows a prosecutor to be questioned about his use of peremptory challenges once he volunteers an explanation. *Teague v. Lane*, 49 U.S. 288, 289 (1989).

The Court of Appeals cited *State v. Osborn*, 631 P.2d 187 (Idaho 1981), as evidence of the state supreme court's

responsibility to review unpreserved claims in capital cases. *Osborn* was decided before Idaho Code § 19-2719 was enacted and could not be considered good law if it applied to excuse raising issues in the state judicial system. *Osborn*, however, does not so provide. The case holds that technical errors will not preclude the state supreme court from considering issues *raised on appeal* by the appellant. The decision does not purport to hold that the court is deemed to have considered issues not raised. *See also: State v. Paz*, 798 P.2d 1 (Idaho 1990) ("Miscarriage of justice" standard; only purley legal issues will be considered for the first time on appeal.)

Courts of other federal circuits have held that a habeas petitioner does not avoid a procedural bar by "implicit" action in state courts. The Court of Appeals for the Eleventh Circuit held in *Walker v. Dugger*, 860 F.2d 1010 (11th Cir. 1988) that merely citing cases involving ex post facto claims was not sufficient to present such a claim to the state courts. Such a rule, the court held, would be inconsistent with the purpose of pleadings to facilitate a proper disposition on the merits because it "would mean that the petition . . . would raise every issue discussed, no matter how superficially, in every case cited in the petition or accompanying memoranda." 860 F.2d at 1011. *See also Puleio v. Vose*, 830 F.2d 1197 (1st Cir. 1987).

The extent to which the Court of Appeals has expanded the concept of a state court ruling on the merits deprives the procedural bar rule of any power to compel litigants to present their federal constitutional claims to state courts. If a defendant is permitted to make a broad claim that he is raising all possible constitutional issues and such a reference suffices to preserve any issue, there

is no incentive for a litigant to present all of his claims in accordance with state procedural rules and in an orderly fashion. In addition, litigants would be deprived of notice that the court would be considering material issues to which they would have no opportunity to respond. *See Gardner v. Florida*, 430 U.S. 349 (1977). The decision of the Court of Appeals contradicts the jurisprudence of this court, which was intended to produce the opposite result. *See Sykes, supra; Engle v. Isaac*, 456 U.S. 107 (1982); *Teague, supra.*

The question presented here has important implications for the administration of justice in the federal courts because of the extent to which it undermines well established rules barring access to federal court in those cases for litigants bypass state procedure. A similar decision by the Ninth Circuit has already been the subject of a petition by the State of Arizona for a writ of certiorari. *Lewis v. Jacoby*, No. 93-1354. If the Court does not resolve the conflict created by *Beam*, a procedural bar will be a very different thing in the Ninth Circuit than it is elsewhere.

II.

THE COURT OF APPEALS DID NOT ACCORD A PRESUMPTION OF CORRECTNESS TO STATE COURT FINDINGS.

The Court of Appeals did not merely eviscerate this Court's procedural bar jurisprudence, it did so by evading 28 U.S.C. § 2254 and the controlling decisions in *Sumner v. Mata*, 449 U.S. 539 (1981) and *Lewis v. Jeffers*, 111 L.Ed.2d 606 (1990). In *Jeffers*, the Court held that "where the issue is solely whether a state court has properly found the existence of a constitutionally narrowed aggravating circumstance, we have never required federal

courts 'to peer majestically over the [state] court's shoulder so that [they] might second guess its interpretation of facts but quite reasonably – perhaps even plainly – fit within the statutory language.' " 111 L.Ed.2d at 623. The Court of Appeals' determination that the sentencing judge relied impermissibly on Beam's "sexual history" is tantamount to a new finding of fact contradicting facts reasonably found by the state sentencing judge. The Court of Appeals second-guessed the sentencing judge with respect to the use he made of information about Beam's background. Judge Lodge determined that Beam's background was a mitigating circumstance. He cannot reasonably be found to have relied on Beam's sexual history as a *basis* for imposing the death penalty.

The judge's sentencing findings were based largely on the facts of the crime, App. at 3-8. In finding that Beam was a "continuing threat" to society, the judge did not mention his "sexual history." Instead, the finding was based on the ease with which Beam committed the murder, his lack of remorse, his abuse of people and animals, his lack of conscience, his threats of violence to others, and his possession of a dangerous weapon in jail. App., at 6. Beam's "sexual history" appeared in the court's findings as a possible mitigating factor and with reference to his lack of rehabilitative potential as affected by impulsiveness and the use of others to satisfy his own personal needs. App. at 2, 5.

The application of the factual information considered by the sentencer to questions of aggravation and mitigation has been left to the state courts. *Lewis v. Jeffers, supra.* It was beyond the authority of the Court of Appeals to

reinterpret the way the facts were applied.[5] Moreover, "[w]hen Congress provided in § 2254(d) that a habeas court could not dispense with the 'presumption of correctness' embodied therein unless it concluded that the factual determinations were not supported by the record, it contemplated at least some reasoned written references to § 2254(d) and the state court findings." *Summer v. Mata*, 449 at 539. The Court of Appeals paid no heed to § 2254(d).

This case furnishes a sound example of the friction between state and federal courts that § 2254(d) was intended to minimize. Beam was first convicted in 1984. Today, ten years later, the Court of Appeals thinks it appropriate to require the state to begin anew on an issue that did not occur even to Beam, for good reason, and which exists only by virtue of the Court of Appeals' reinterpretation of the way the state's "continuing threat" factor was applied.

III.

THE COURT OF APPEALS HOLDING APPLIES A NEW RULE OF CONSTITUTIONAL LAW THAT CANNOT BE APPLIED RETROACTIVELY CONSISTENT WITH *TEAGUE V. LANE*, 489 U.S. 288 (1989).

The Court of Appeals decided Beam's case by applying a previously unheard-of rule to the effect that a

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[5] The Idaho Supreme Court reviewed the death sentence imposed on Beam in order to determine whether arbitrary factors were present and found none. *State v. Beam*, 710 P.2d 526 (Idaho 1985).

sentencing court may not consider aspects of a defendant's background that could reasonably be viewed as antisocial or at least explanatory of his socially maladaptive character. Inasmuch as the sentencing court did not expressly make a connection between Beam's "sexual history" and the decision to impose the death penalty, the Court of Appeals' rule can be viewed as a strict prohibition against any reference at sentencing to homosexual behavior or to a family history of socially unacceptable sexual behavior.

Teague v. Lane, 489 U.S. 288 (1989), held that federal habeas corpus would not be available for retroactive application of new rules of federal constitutional law. Thus, state convictions or sentences based on good faith reliance by state judges on contemporary legal principles may not be upset in a federal habeas court by retroactive application of a new legal principle. The Court pointed out in *Teague* that the function of federal habeas corpus to deter state violations of federal law has no force when habeas relief is granted to undo state actions that were legal when taken. *Id.*; *Butler v. McKellar*, 494 U.S. 407 (1990).

There are three exceptions to the *Teague* rule against retroactive application: a federal court may apply a "new rule" if it is one that "forbid[s] criminal punishment of certain primary criminal conduct," or is a rule that prohibits "imposing the death penalty on a certain class of defendants because of their status . . . or because of the nature of their offense." *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989). The second exception authorizes retroactive application of new rules on federal collateral review in circumstances where the "new rule" compels observance

of procedures considered to be necessary attributes of the concept of ordered liberty. *Teague, supra.* The first exception has been described as one that authorizes collateral application of certain kinds of new rules because there is little social interest in preventing retroactive application of decisions which deny the state the power to impose certain penalties or to penalize particular conduct. *Penry,* 492 U.S. at 330.

The Court of Appeals misapplied *Teague.* In Beam's case, the court held that the first exception to the doctrine, relating to retroactive application of new rules protecting "certain primary criminal conduct," allowed it to invalidate the sentencing judge's finding of three valid statutory aggravating factors by the application of a new rule controlling the sentencer's consideration of evidence about the defendant's personal characteristics. The Court of Appeals' decision necessarily recasts the first exception to *Teague v. Lane,* in a manner so broad as to deprive the underlying rule of any meaning. (*See,* Idaho Code § 19-2515(g)(8)). Although the sentencing judge held that he would impose the death penalty on any one of three aggravating factors standing alone, App., at 8, all of the mitigating circumstances considered, the Court of Appeals held that all of the findings had been tainted by what it considered the judge's improper consideration of Beam's "sexual history." The court's reasoning was to the effect that the sentencer's historical reference to Beam's background, which included "a long history of deviant sexual behavior, including incest, homosexuality, and abnormal sexual relationships," App., at 5, amounted to

impermissible bias in the process of considering aggravating and mitigating factors and thereby rendered the entire process "arbitrary."

The court's decision that Beam's "sexual history" was irrelevant alters the meaning of this court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The court supported its conclusion that the death sentence was arbitrarily imposed upon Beam on the two-point theory that the sentencer linked Beam's death sentence to his "sexual history" and that there was no evidence of a link between Beam's past sexual conduct and the question of his future dangerousness, see, App. at 36, an observation dependent upon the court's view that deviant sexual behavior is irrelevant at sentencing.

> It goes without saying that society has abandoned its earlier belief that homosexuals present a danger to the community. It should also go without saying that victims of incest may not be further punished be making their misfortune the basis for the subsequent execution. App. at 37.

Accordingly, the court held that the state was not entitled "to make the application of the death penalty depend upon a particular characteristic of the offense or the offender if selection of such a characteristic 'makes no measurable contribution to acceptable goals of punishment'." App. at 32, citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977).[6] The Court of Appeals holding is clearly a

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[6] As we have previously pointed out, the Court of Appeals' factual revision of the trial court bears little resemblance to what the state sentencing judge actually found or relied upon.

"new rule" because the outcome is not dictated by precedent existing at the time Beam's conviction became final. *Butler v. McKellar, supra.* The Court of Appeals has in fact altered the meaning of the first *Teague* exception in a manner *contrary* to this court's existing definitions of "primary conduct."

Notwithstanding the view of the Court of Appeals, the kind of exempt primary conduct to which the first *Teague* exception applies has been understood to refer to the underlying criminal charge of which the defendant was convicted, in this case, first degree murder. *See, Butler v. McKellar, supra. See also: Street v. New York,* 394 U.S. 576 (1969) (punishment for the exercise of free speech); *Stanley v. Georgia,* 394 U.S. 557 (1969) (punishment for mere possession of obscene material); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (penalizing use of contraceptives); *Loving v. Virginia,* 388 U.S. 1 (1967) (penalizing inter-racial marriage). The Court of Appeals has extended the scope of this exception so that it applies not just to the criminal conduct charged, but to the sentencer's consideration of non-statutory factors, to the end that a state court's examination of aspects of a defendant's character and background may be subjected to intrusive federal scrutiny under the Eighth Amendment. This is a standard of federal review that authorizes a federal court to ignore state court fact finding and reconsider the weight of facts, the interpretation of facts and even, *sua sponte,* the integrity of the sentencing judge.

The mischief of the court's holding is particularly evident in this case. The Court of Appeals has re-evaluated the mitigating and aggravating evidence and concluded that some of it was merely neutral, at best. It is

apparent that the exceptions to the rule of non-retroactive application of new rules announced in *Teague* were not intended to *expand* the opportunities for federal review of state criminal judgments. *Teague*, to the contrary, places limits on federal collateral review, recognizing that it is not the purpose of such review to revise state judgments in order to bring them parallel to new notions of constitutional law. *Butler, supra; Sawyer v. Smith*, 497 U.S. 227 (1990).

The exceptions to *Teague* have regularly been applied by this Court in much narrower fashion. See, e.g., *Butler, supra; Saffle v. Parks*, 494 U.S. 484 (1990). The decision below is also inconsistent with the decisions of other federal circuits that have not recognized the kind of extension to the *Teague* exception employed by the Court of Appeals. See, *Clark v. Dugger*, 901 F.2d 903 (11th Cir. 1990) (The first *Teague* exception applies to a shifted boundary of criminal conduct); *Hardy v. Washington*, 922 F.2d 294 (6th Cir. 1990) (Placing primary conduct to beyond the scope of governmental authority), *Smith v. Black*, 904 F.2d 950 (5th Cir. 1990) (First *Teague* exception does not apply when the new rule "would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons." 904 F.2d at 986.)

On its merits, the panel's holding is at odds with this court's decisions requiring state sentencing authorities to receive all pertinent information about a defendant's background and character, *Lockett v. Ohio*, 438 U.S. 586 (1978); *Saffle v. Parks, supra*, and in declining to intrude upon a state's judgment about the social acceptability of

various kinds of voluntary sexual conduct. *Bowers v. Hardwick, supra.*

The Court of Appeals argued that it was merely applying an old rule announced in *Herndon v. Lowry*, 301 U.S. 242 (1937) rather than announcing a new rule in violation of *Teague*. In *Herndon*, the Court made the unremarkable observation that states were not entitled to penalize the legitimate exercise of First Amendment rights. This principle is much different from the panel holding that the state, by sentencing Beam to death, somehow violated a right of private conduct. In the first place, it is clear that Beam's death sentence was not the product of his private sexual conduct. Secondly, *Herndon* cannot reasonably be applied to render Beam's sexual conduct constitutionally protected activity.

The Court of Appeals' redefinition of a "new" rule, subject to retroactive application, depends on the supposition that the *Herndon* principle may be applied without extending its meaning. *Herndon* requires that penalties on utterances be justified by a "reasonable apprehension of danger to organized government." The Court of Appeals' holding that the state's alleged use of Beam's sexual history to support the death penalty was not justified by a showing of valid penological purpose is seen by the court as nothing more than an application of *Herndon* to a different set of facts.

This Court explained in *Stringer v. Black*, 112 S.Ct. 1130 (1992) that the first step to be taken by a federal habeas court in applying a principle of law announced after final judgment in a state criminal case is to ask whether a "new rule" is being applied or, if not, whether

granting relief would create a new rule because earlier precedent is used in a novel setting, thereby extending precedent. *See also Graham v. Collins*, 113 S.Ct. 892 (1993); *Caspari v. Bohlen*, No. 92-1500, February 23, 1994. *Stringer* dealt with the application of the "special heinousness" aggravating factor as affected by the Court's decisions in *Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Clemons v. Mississippi*, 484 U.S. 738 (1989). The Court held that a new rule was not applied because the same rule governing the precision of meaning of capital aggravating factors that governed Stringer's case had controlled in *Godfrey v. Georgia*, 446 U.S. 420 (1980), which was decided before Stringer's case became final. *Beam*, however, takes a general principle governing regulation of free speech, a preferred right, and applies it in a wholly different context. To say that the new application is novel, and therefore extends the precedent, is an understatement, especially given *Bowers v. Hardwick, supra*.

The rule applied below, were it to remain in place, would establish that federal appeals court judges, acting on their own motion, could enact new rules of social behavior and apply them retroactively to state criminal judgments. This is such a significant modification of *Teague* that it should not be the law of an entire federal circuit without this Court's express consideration. Moreover, the distinction drawn by the Court of Appeals between substantive matters and procedure as a test for applying *Teague* is novel and entirely unwarranted by prior precedent. To let the decision in *Beam* stand would

invite an entire new body of exceptions to *Teague* most likely not envisioned by this Court.

CONCLUSION

The petition for Certiorari should be granted and this Court should vacate the judgment of the Court of Appeals, either summarily or after hearing.

Respectfully submitted,

LYNN E. THOMAS
Deputy Attorney General
Counsel of Record for Petitioner

APPENDIX A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO, Plaintiff, vs. ALBERT RAY BEAM, Defendant.	Case No. C-5527 FINDINGS OF THE COURT IN CONSIDERATION OF THE DEATH PENALTY PURSUANT TO SECTION 19-2515, IDAHO CODE (Filed Mar. 19, 1984)

The above-named defendant having been convicted of the criminal offense of First Degree Murder with deliberation and premeditation, which under the law authorizes the imposition of the death penalty; and the Court having ordered a pre-sentence investigation of the defendant, and thereafter having held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

NOW THEREFORE, the Court hereby makes the following findings:

1) *Conviction.* That the defendant, while represented by Canyon County Public Defender Van Bishop, was found guilty by jury verdicts of the offenses of First Degree Murder with malice, premeditation, and deliberation, and Rape.

2) *Pre-Sentence Report.* That a pre-sentence report was prepared by order of the Court and was delivered to

the defendant or his counsel at least seven (7) days prior to the sentencing hearing pursuant to Section 19-2515, Idaho Code, and Rule 33.1, Idaho Criminal Rules.

3) *Sentencing Hearing.* That a sentencing hearing was held on March 8, 1984, pursuant to notice to counsel for the defendant and the State, and that at said hearing in the presence of the defendant, the Court heard relevant evidence in aggravation and mitigation of the offenses and entertained arguments of counsel thereon.

FACTS AND ARGUMENTS FOUND IN POSSIBLE MITIGATION

In an effort to comply with the mandates of *State vs. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981), Idaho Code Section 19-2515(d), and Idaho Criminal Rules 33.1 and 33.2, this Court finds the following as possible mitigating facts:

1) Defendant is twenty-one (21) years of age.

2) Defendant was raised in a turbulent family setting that included alcohol and drug abuse, sexual deviancy, and educational deprivation.

3) Defendant was cooperative with law enforcement upon his arrest and admitted his involvement in the commission of the crimes.

4) Defendant testified in the State's case as to the culpability of the co-defendant, Scroggins, and as to his own involvement (not believed by jury, however).

5) Defendant has limited employment skills as a cook and a mechanic.

6) Defendant is not mentally ill, but does suffer from certain learning disabilities because of the poor home environment and social pathology.

FACTS AND ARGUMENTS FOUND IN AGGRAVATION

1) The killing was exceptionally cruel and senseless.

The victim, a thirteen-year-old girl, was enticed into a secluded area, handcuffed, raped by the defendant, sodomized and forced to engage in oral sex by the co-defendant, according to Mr. Beam, and was told that she was going to be drowned. She was then taken to a canal some distance away while still handcuffed, where she was repeatedly submerged in the water until additional force was necessary, and then her throat was cut four or five times by one of the defendants.

2) The defendant exhibited utter disregard for human life by holding the victim's head under water until the last signs of life were gone, and then left her body in the muddy and murky waters of the canal.

3) The crimes were the result of a plan and scheme initiated by the defendants in the home of Mondi Lenten. The evidence is undisputed that the defendants, while in the bathroom together, conspired to ask Mondi Lenten or her friend, Donnette Fargher, if either of them, but only one, would like to go with them to smoke marijuana and get high. Neither of the defendants had any marijuana, and as soon as they got Mondi into a secluded area, they stripped her of her clothing with the use of a knife, handcuffed her, and commenced the sexual assault. The evidence is clear that the victim's body was not only

battered and bruised, but also had blood in the crotch area even though she was not menstruating.

4) The record is void of any provocation on the part of the victim, but in fact shows that she had gone along with the defendants trusting in their friendship.

5) The cold-blooded manner in which the victim was raped and killed by the defendant manifested such depravity as to offend all standards of human compassion, feeling or decency; the actions and conduct of the defendant were deliberate, malicious, and done with the specific intent to cause the death of Mondi Lenten.

6) While the defendant had ingested or smoked a marijuana cigarette earlier in the day which he alleges was also laced with PCP, the commission of this crime did not occur until after midnight, and there is no evidence to suggest that the defendant was at that time under the control or influence of any mind-controlling drug and/or alcohol. Defendant's actions immediately after the killing clearly demonstrate that he was weighing the pros and cons of what he had done, and that plans were made to flee the area.

7) The motive for killing the victim was clearly to silence her so she could not tell on, or report, the defendants. The defendant, Beam, was on parole from the Idaho State Penitentiary, and he knew that Donnette Fargher could place the victim with him. Any evidence of having assaulted a thirteen-year-old girl would have placed him back in custody for many years, and he knew it.

8) The defendant's record is extensive both as a juvenile and as an adult in light of his age. He is described by collateral contacts as a social outcast, a substance abuser, and a thief.

Based on the BETA Parole Assessment Classification scale, defendant was given a one in eight chance of being successful on parole when he was paroled in November of 1982. This crime was committed in July of 1983 while defendant was on parole.

The defendant was not successful on the 120-day program before going to the penitentiary and is believed to be virtually unemployable because of his social pathology and learning deficits.

9) The prognosis for any substantive rehabilitation is non-existent.

The psychological evaluation describes the defendant as a person who lacks an adequate conscience, who is impulsive, and who uses others to satisfy his own personal needs.

Defendant has a long history of deviant sexual behavior, including incest, homosexuality, and abnormal sexual relationships with women both older and younger than the defendant.

The report describes the defendant as one inclined to use poor judgment and who at times acts out his basic hostility by being abusive to both people and animals. (See reports attached.)

10) In support of the Court's finding that the defendant has a propensity to commit murder, which will probably constitute a continuing threat to society, all one

has to consider is the ease with which the defendant committed this crime; his total lack of remorse; his abuse of people and animals; the psychological evaluation which finds that there is a lack of adequate conscience development and that he is unable to feel with and/or for another person; Sandra Whalen's (defendant's girlfriend) statements that defendant would often get extremely angry and report that he was going to kill the individual with whom he was angry; Ricky Chilton's testimony that Beam said he was going to cut his guts out; the fact that he was found with a razorblade attached to a toothbrush in jail, which a jailer testified was typically used for a dangerous weapon. All suggest that the defendant is possessed with a great deal of pent-up anger and frustration and that, with defendant's personality, they provide the catalyst for the propensity to commit a similar crime.

11) Defendant is described throughout the record as a follower and one who is easily influenced to do wrong. In a penitentiary setting his self image would only deteriorate further, and he would be potentially dangerous to himself and to others.

12) Both defendants demonstrated the cowardliness of their character by blaming the other for the sadistic death of Mondi Lenten even though the evidence is clear that they both were involved from the very beginning.

STATUTORY AGGRAVATING CIRCUMSTANCES FOUND UNDER SECTION 19-2515(f) OF THE IDAHO CODE

The Court finds the following aggravating circumstances existed beyond a reasonable doubt.

1) The murder was especially heinous, atrocious, cruel and manifested exceptional depravity (5).

2) By the murder and circumstances surrounding its commission, the defendant exhibited utter disregard for human life (6).

3) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society (8).

REASONS FOR THE DEATH PENALTY

The Court finds that the defendant actively participated in a cruel and savage slaying of a thirteen-year-old girl who had done nothing to provoke the same.

The intentional and malicious killing took from the victim what an offender can never restore – the fragile gift of life.

The defendant's actions were void of human compassion or understanding and embodied the ultimate affront to society.

A separate Court found the rape and murder by drowning of Daralyn Johnson, a nine-year-old girl, to be so heinous and atrocious as to mandate the imposition of the death penalty.

Mondi Lenten and the boys and girls who use the sidewalks and streets of our community cry out for this Court to be responsible to the will of the people and to its conscience, and to take the action that is necessary to help deter others from committing like crimes.

It is clear from the record and the facts of this case that the mitigating circumstances do not outweigh the gravity of the aggravating circumstances so as to make unjust the imposition of the death penalty. In fact, because of the gravity of the offense and the strong factors weighing against any possibility of rehabilitation, any one of the aggravating circumstances found by this Court to exist outweighs the mitigating circumstances. The defendant, by his own actions, has forfeited his right to live.

No legal cause to the contrary has been shown, and it is the judgment of this Court that the death penalty should be imposed on the defendant for the capital offense of which he was convicted.

IT IS, THEREFORE, ADJUDGED that the defendant is guilty of the crime of First Degree Murder with malice, deliberation and premeditation, and that he should be sentenced to death by the Idaho State Board of Corrections in a manner prescribed by law on April 13, 1984.

IT IS, THEREFORE, ADJUDGED and DECREED that the defendant is guilty of Rape by verdict of the jury and should be sentenced to the Idaho State Board of Corrections for a fixed period of time of thirty (30) years.

Dated this 19th day of March, 1984.

/s/ Edward J. Lodge
District Judge

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT RAY BEAM, *Petitioner-Appellant,* v. DAVID PASKETT, Warden Idaho State Prison-Boise, *Respondent-Appellee.*	No. 90-35616 D.C. No. CV-89-1114-HLH ORDER AND AMENDED OPINION

On Remand from the United States Supreme Court

Filed September 2, 1993
Amended November 16, 1993

Before: Dorothy W. Nelson, Robert Boochever, and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Criminal Law and Procedure/Capital Cases

On remand from the Supreme Court, the court of appeals affirmed in part and reversed in part an order of the district court and remanded. The court held that the imposition of a death sentence based on a finding that a defendant posed a continuing threat to society because of

his consensual or involuntary nonviolent sexual history violated the Eighth Amendment.

Appellant Albert Beam was jointly tried in Idaho with a codefendant on a capital charge. Because statements by both defendants inculpating the other might be inadmissible, a dual-jury trial was had. Both defendants were convicted.

The sentencing court in Idaho, in which the finding of an aggravating circumstance required a death sentence unless outweighed by mitigating circumstances, found three statutory aggravating circumstances applied to Beam, including Beam's demonstrated propensity to commit murder that would probably constitute a continuing threat to society. That finding was based on the court's conclusion that Beam's prognosis for any substantive rehabilitation was nonexistent because of Beam's history of deviant sexual behavior, including incest, homosexuality, and abnormal sexual relationships with women older and younger than he. The court found that due to the nonexistent probability of Beam's rehabilitation, any one of the three aggravating circumstances outweighed the mitigating factors. Beam's death sentence was affirmed by the state supreme court.

Beam's federal petition for writ of habeas corpus was denied by the district court. The court of appeals affirmed his conviction, but vacated his death sentence in reliance on *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991). The Supreme Court reversed *Creech*, vacated the appeals court's judgment, and remanded for reconsideration.

[1] There was no indication in the record that Beam's defense was hampered or the state's prosecution unfairly strengthened by the dual-jury trial.

[2] Although the Idaho Supreme Court did not expressly address a constitutional challenge to the continuing-threat factor, Beam's appeal challenged the death penalty statute as arbitrary, thus obliging the court to consider whether the continuing-threat factor was applied on the basis of arbitrary considerations. Therefore, Beam's continuing-threat challenge was not procedurally defaulted regardless of the failure of the Idaho court to address it. [3] Moreover, in light of Idaho's statutorily mandated review of death penalty cases, the court's affirmance of Beam's sentence necessarily included the determination that his sentence was not based on any arbitrary factor in violation of the Eighth Amendment. Because that was a determination of federal law and did not constitute an independent and adequate state ground, there was no procedural bar to Beam's habeas challenge.

[4] Because the sentencing court's linkage of Beam's sexual history and his future dangerousness was not based on any record evidence [5] and appeared to be the product of the court's arbitrary, preconceived attitudes, [6] the danger was too great that the sentencer merely found Beam's behavior morally reprehensible, a reason for imposing a death sentence not permitted by the Eighth Amendment.

[7] Since the sentencing court found that any one of the aggravating factors outweighed the mitigating factors on the basis of the invalid conclusion that Beam's sexual

history demonstrated that there was no probability of rehabilitation, and likewise applied that conclusion to its finding that the combination of all aggravating factors outweighed all mitigating factors, the balancing process could not be relied upon and the sentence had to be vacated.

COUNSEL

David Skeen, Port Townsend, Washington, for the petitioner-appellant.

Gar Hackney, Lynn Scott, Hackney & Jackson, Boise, Idaho, for the petitioner-appellant.

Lynn E. Thomas, Boise, Idaho, for the respondent-appellee.

ORDER

The opinion filed on September 2, 1993, is amended as follows:

Page 9537, Line 2.

Delete:

1461 (9th Cir. 1992).

Add:

1461 (9th Cir. 1992).[4]

Page 9537, Line 8.

Renumber:

Old Footnote 4 as New Footnote 5.

Page 9538, Line 5.

Renumber:

Old Footnote 5 as New Footnote 6.

Page 9542, Line 18, to Page 9543, Line 20.

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[4] We reject the State's argument that Idaho Code § 19-2719 barred the Idaho Supreme Court from conducting its own independent review of Beam's sentence pursuant to the requirements of Idaho Code § 19-2827. Section 19-2719 was enacted to consolidate all petitions for *state collateral relief* into a single state proceeding, along with the direct appeal. *See, e.g., State v. Card*, 825 P.2d 1081, 1086-87 (Idaho 1991), *cert. denied*, 113 S. Ct. 321 (1992). Section 19-2719 did not alter in any way, however, the Idaho Supreme Court's *independent duty* under section 19-2827 to review each death sentence and to determine whether the sentence was "imposed under the influence of passion, prejudice, or any other arbitrary factor." For example, the Idaho Supreme Court applied section 19-2827 in *Beam* itself, *see Beam*, 710 P.2d at 534, to reach issues not raised by the appellant. It is clear under Idaho law that section 19-2827 was nor repealed or narrowed by section 19-2719. *See, e.g., State v. Hoffman*, 851 P.2d 934, 937, 943-45 (Idaho 1993) (applying both sections 19-2719 and 19-2827); *Card*, 825 P.2d at 1086-87, 1094 (same); *State v. Paz*, 798 P.2d 1, 18-19 (Idaho 1990) (same), *cert. denied*, 111 S. Ct. 2911 (1991); *State v. Lankford*, 781 P.2d 197, 200-01 (Idaho 1989) (same), *cert. denied*, 497 U.S. 1032 (1990).

Delete:

3. *Retroactivity*. . . . est in finality here.

Add:

3. *Retroactivity*

The Supreme Court's holding in *Teague v. Lane*, 489 U.S. 288 (1989), does not bar our conclusion that the trial court's application of the "continuing threat" aggravating factor violated the Eighth Amendment. Our holding that invalidates the state court's incapacitation rationale for Beam's death sentence, *see supra* pp. 9537-42, is based upon the rule established in *Herndon v. Lowry*, 301 U.S. at 258, which was announced nearly 50 years before Beam's state collateral attack became final.[7] As the Supreme Court has recently noted, a rule is not "new" simply because it is applied to a set of different facts. *See Stringer v. Black*, 112 S. Ct. 1130, 1135-40 (1992); *Wright v. West*, 112 S. Ct. 2482, 2499 (1992) (Kennedy, J., concurring) ("If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule."). Because we simply applied the general *Herndon* rule to the specific facts of this case, we conclude that our holding does not create a "new" rule. Moreover, the issue before us involves the substance of the criminal law, not a rule of criminal procedure.

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[7] As we mentioned above, *Herndon* stands for the proposition that any limitation upon individual liberty – for example, liberty from cruel and unusual punishment – must have an "appropriate relation to the safety of the state." *Id.*

See United States v. Sood, 969 F.2d 774, 775 (9th Cir. 1992) ("*Teague*, however, dealt with the retroactive application of a new constitutional rule of criminal procedure, not with the application of decisions affecting the substance of criminal laws. This court has recognized the distinction." (internal quotes omitted)).

Furthermore, even if our application of *Herndon* were "new," *Teague's* bar against the application of new rules on a writ of habeas corpus does not apply to "rules forbidding criminal punishment of certain primary conduct" or "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). The state's interest in finality is not unduly hindered by retroactive application of such rules because " '[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.' " *Id.* (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (opinion of Harlan, J.)).

Our Eighth Amendment holding in Beam's case falls squarely within both parts of the exception quoted above. With respect to the first part, our holding clearly forbids "criminal punishment of certain primary conduct" – namely criminal punishment of non-violent, consensual, or involuntary past sexual acts. This conduct is precisely the kind of "private individual conduct" that is beyond the power of the state to proscribe through the death penalty. *Teague*, 489 U.S. at 307 (plurality opinion) (quoting *Mackey*,

401 U.S. at 693 (opinion of Harlan, J.)).[8] Where the death penalty is based in part on that conduct, the first part of the exception is applicable.[9] With respect to the second part, the Supreme Court has prohibited retroactive punishment based upon an individual's status, *see, e.g., Penry*, 492 U.S. at 330 (mental retardation); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (insanity), or his offense, *see, e.g., Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (rape). Like those cases, our holding also simply prohibits "a certain category of punishment," i.e., the death penalty, "for a class of defendants because of their status of offense," i.e., where the penalty is based in part on the type of sexual practices we have described.

Page 9543, Line 34.

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[8] *Butler v. McKellar*, 494 U.S. 407, is not to the contrary. There, the Court held that the "primary conduct" exception to *Teague* was inapplicable because the "new" rule in that case – involving *Miranda* warnings – did not forbid criminal punishment for any primary conduct on the part of the petitioner. *Id.* at 415. By contrast, the "new" rule in this case clearly forbids criminal punishment for "certain primary conduct" on the part of the petitioner – namely his non-violent, consensual, or involuntary past sexual acts.

[9] *Bowers v. Hardwick*, 478 U.S. 186 (1986), is not to the contrary. *Hardwick* held that there is no fundamental right to engage in sodomy under the substantive Due Process Clause. However, the Court left open the possibility that punishment for such acts would violate the Eighth Amendment. *See id.* at 197 (Powell, J., concurring) ("In my view, a prison sentence for [sodomy] – certainly a sentence of long duration – would create a serious Eighth Amendment issue.") Because our holding is based on the Eighth Amendment, *Hardwick* is not applicable.

Renumber:

Old Footnote 6 as New Footnote 10.

OPINION

[As Amended and As Amended on Denial of Rehearing]

REINHARDT, Circuit Judge:

In 1983, the petitioner, Albert Ray Beam, and Michael Shawn Scroggins were charged with the rape and murder of thirteen-year old Mondi Lenten. Each of the defendants, during the course of the proceedings, attempted to place the blame for the crime on the other, and a central issue in the case was which of the two was primarily responsible for the murder. For this reason, each defendant was represented by separate counsel. They were, however, tried jointly. Concerned that each defendant's statements, which inculpated the other, would not be admissible in the other's trial under *Bruton v. United States*, 391 U.S. 123 (1968), the state requested the court to empanel two juries to hear the case – the juries to sit simultaneously when issues relevant to both defendants were introduced and separately otherwise. The state trial judge, Edward J. Lodge, granted the request. Thus, for example, when testimony probative as to Beam but prejudicial as to Scroggins was introduced or Beam's counsel would cross-examine a witness, Scroggins' jury would be excused – and vice versa. Separate opening and closing arguments were given before each jury.

Beam's jury found Beam guilty of premeditated first degree murder and rape. Scroggins' jury convicted Scroggins of first degree murder, finding that he aided and abetted the crime but did not commit it directly, and also convicted him of attempted rape. Both defendants were

acquitted on the separate enhancement charge of using a deadly weapon in the commission of a crime.

The trial judge sentenced Beam to death for murder and to 30 years in prison for rape. He sentenced Scroggins to death for murder and to ten years in prison for attempted rape. In Beam's case, he relied on three statutory aggravating circumstances: the murder was "especially heinous, atrocious, cruel and manifested exceptional depravity"; the defendant "exhibited utter disregard for human life"; and the defendant "exhibited a propensity to commit murder which will probably constitute a continuing threat to society."

Both defendants appealed to the Idaho Supreme Court. Beam's conviction and sentence were upheld in *State v. Beam*, 710 P.2d 526 (Idaho 1985), *cert. denied*, 476 U.S. 1153 (1986). The sentence of death in Scroggins' case was reversed, however. *See State v. Scroggins*, 716 P.2d 1152, 1161 (Idaho 1985), *cert. denied*, 479 U.S. 989 (1986). The state court held that, in light of the fact that Scroggins did not personally commit the crime, did not have a history of violent criminal conduct, had barely reached the age of majority, and came from a troubled family, his sentence was disproportionate to the sentences of other Idaho capital defendants. *See id.* at 1159-60. Scroggins' case was remanded to the state trial court for resentencing.

Judge Lodge recused himself from presiding over Scroggins' resentencing. First, he expressed disagreement with the Idaho Supreme Court's disparate treatment of Beam and Scroggins, stating that the action of the two defendants were "equivalent" and that "the record in this

case supports the conclusion that any disparity between Scroggins' and Beam's participation is a distinction with little difference." Next, he stated that "reasonable minds could not differ" about the fact that Scroggins deserved to die. Finally, reviewing the sentencing alternatives remaining in Scroggins' case – "a fixed sentence without chance of parole, with costs running between $28.00 and $55.00 per day, or a life sentence with eligibility of parole in ten years" – he concluded that none was "reasonable or acceptable to the conscience of this court." Accordingly, Judge Lodge determined to have no "further involvement in these matters." Scroggins was then resentenced by a different judge.

Following Scroggins' resentencing, Beam filed a petition for post-conviction relief and a motion for a reduction of his sentence, raising a number of constitutional issues. In addition, Beam moved to disqualify Judge Lodge from sitting in the post-conviction and sentence reduction proceedings. Judge Lodge summarily denied the disqualification motion and then rejected Beam's claims for relief. The Idaho Supreme Court affirmed. *See State v. Beam*, 766 P.2d 678 (Idaho 1988), *cert. denied*, 489 U.S. 1073 (1989).

Beam then filed a petition for writ of habeas corpus in the United States District Court for the District of Idaho. His petition was denied. *See Beam v. Paskett*, 744 F.Supp. 958 (D. Idaho 1990). On appeal, we affirmed his conviction but vacated his death sentence. *See Beam v. Paskett (Beam I)*, 966 F.2d 1563 (9th Cir. 1992). We did so after holding that the "utter disregard" factor was unconstitutionally vague, relying primarily on *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991). Last term, the United States

Supreme Court reversed *Creech*, *see Arave v. Creech*, 113 S. Ct. 1534 (1993), vacated our judgment, and remanded the case for further reconsideration. *See Arave v. Beam*, 113 S. Ct. 1837 (1993). On remand, we again affirm Beam's conviction and again vacate his death sentence. It is, however, only the latter that we have reconsidered.

I. The Constitutionality of Beam's Conviction

Beam contends that the use of dual juries during the simultaneous trial of Scroggins and himself violated his rights under the Fifth, Sixth and Fourteenth Amendment. In the absence of prejudice to the defendant, courts have on some occasions allowed the use of dual juries in non-capital cases. *United States v. Sidman*, 470 F.2d 1158, 1169-70 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973); *see also Smith v. DeRobertis*, 758 F.2d 1151, 1152 (7th Cir.), *cert. denied*, 474 U.S. 838 (1985); *United States v. Lewis*, 716 F.2d 16, 19 (D.C. Cir.), *cert. denied*, 469 U.S. 996 (1983). We have never considered the question in connection with a capital case, but a number of courts have expressed serious reservations regarding the use of dual juries in any but the simplest of trials, *see, e.g., Scarborough v. State*, 437 A.2d 672, 674-76 (Md. App. 1981); *State v. Corsi*, 430 A.2d 210 (N.J. 1981). Our affirmance in *Sidman* was qualified by the statement that "our holding is not to be read as an endorsement of the 'experiment' that was carried out in this case," 470 F.2d at 1170.

We need not determine here whether use of a dual jury in a case resulting in capital punishment would be a ground for invalidating a conviction. Because we vacate

Beam's death sentence on other grounds, we do not subject his trial to the exacting constitutional scrutiny required when a defendants life will be taken. Although there are some procedural requirements that are imposed on capital trial regardless of the actual sentence received by the defendant, *see, e.g., Wiggerfall v. Jones*, 918 F.2d 1544, 1548-50 (11th Cir. 1990), we believe that the level of constitutional scrutiny given to the state's use of a dual jury procedure is determined by the nature of the punishment the defendant will actually suffer rather than by the potential that existed at the outset of the trial. The dual jury procedure introduces additional complexity and likelihood of error into the trial and thereby impairs a defendant's ability to conduct his defense. For this reason, a dual jury verdict is inherently more dubious than an ordinary verdict – even in the absence of a showing of specific prejudice. The degree of unreliability is not dependent, however, upon whether the trial is a capital one or not. *Cf. Beck v. Alabama*, 447 U.S. 625, 642-43 (1980) (stating that jury verdicts following a failure to give a lesser included offense instruction are inherently more suspect in capital than non-capital trials). Whatever additional constitutional constraints exist on the use of dual juries in capital trials would be a consequence of the greater reliability demanded of verdicts upon which a sentence of death is based, and not upon any additional uncertainty created by the fact that the trial is capital in nature. Because we vacate Beam's death sentence, we analyze his challenge to the dual jury system under the standards applicable in non-capital cases.

We do not believe that the use of dual juries in a non-capital case is by itself grounds for reversal in a habeas

case. Although we were careful not to sanction the continued use of dual juries when we affirmed a dual jury conviction in *Sidman*, 470 F.2d at 1170, our review of a state court conviction is ordinarily limited to violations of federal constitutional law; we may not exercise our supervisory powers in such a context, *see Estelle v. McGuire*, 112 S. Ct. 475, 482 (1991); *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). Thus, while it is possible that we would disapprove such a procedure as "inappropriate" if used by a federal district court, *cf. United States v. Alvarado*, 838 F.2d 311, 316 (9th Cir.) (holding that the district judge committed error by using an "inappropriate" jury instruction), *cert. denied*, 487 U.S. 1222 (1988), we will affirm a state court dual jury verdict unless it violates the Constitution-specifically we will affirm such a verdict (that does not serve as the basis for the defendant's execution) unless the defendant can demonstrate that he was prejudiced by the use of the procedure. *See Smith*, 758 F.2d at 1152.

[1] The issue, therefore, is whether Beam was prejudiced by the use of the dual juries. The district court determined that he was not. We agree. There is no indication in the record before us that Beam's defense was hampered or the prosecutor's case unfairly strengthened by the state's use of the dual jury trial.[1] We therefore

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[1] The state's use of dual juries rather than a single jury in the joint trial of Beam and Scroggins may have had a strategic element to it. When dual juries are used, it becomes more likely that both defendants will be convicted of the most grievous conduct alleged, thereby leading to the imposition of the death penalty on both. A single jury, on the other hand, may well assess relative blame, with the resultant imposition of a non-

reject Beam's challenge to the dual jury verdict in this case.[2]

II. The Constitutionality of Beam's Death Sentence

Beam was sentenced to death pursuant to Idaho Code § 19-2515. Under this section, a person convicted of a capital offense may not be sentenced to death unless the court finds that at least one statutory aggravating circumstance is present. *See* Idaho Code § 19-2515(c). If the court finds such a circumstance, it "shall sentence the defendant to death unless [it] finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust." *Id.* Subsection (g) lists 10 statutory aggravating circumstances. *See* Idaho Code § 19-2515(g)(1-10).

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capital sentence on the less blameworthy of the two defendants. Any such strategic motivation has been rendered inconsequential here, however. Both juries did not convict their respective defendants of the same degree of criminal conduct; Scroggins was convicted of aiding and abetting. Further, the fact that we vacate Beam's sentence lessens our concern regard the consequences of any strategic motive that underlay the prosecution's choice of the dual jury system. *Cf. Fisher v. United States*, 328 U.S. 463, 485 n.8 (1946) (Frankfurter, J., dissenting) ("Federal judges are not referees in sporting contests. Their duty to keep a trial in the course of justice is especially compelling where the penalty for conviction is death.").

[2] Nothing in this part of our opinion precludes Beam from raising this issue against if the state seeks to have the death penalty imposed on him following remand.

The state court found three aggravating circumstances in Beam's case. First, it found that "[t]he murder was especially heinous, atrocious, cruel and manifested exceptional depravity." (Idaho Code § 19-2515(g)(5)). Next, it found that "the defendant exhibited utter disregard for human life." (§ (g)(6)). Finally, it found that the defendant "has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." (§ (g)(8)). Having found the requisite statutory aggravating factors, the court then sentenced Beam to death, stating that "[i]t is clear from the record and the facts of this case that the mitigating circumstances do not outweigh the gravity of the aggravating circumstances so as to make unjust the imposition of the death penalty."

We must determine whether Beam's death sentence is constitutional in light of the trial court's application of the above statutory provisions.

A. The "Utter Disregard" Factor

In *Beam I*, we determined that one of the three statutory aggravating factors found to be present in Beam's case – that "the defendant exhibited utter disregard for human life" – was unconstitutionally vague. *See Beam I*, 966 F.2d at 1574-75. We relied principally upon *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991). Last term, the Supreme Court reversed *Creech* and held that the "utter disregard" factor as construed by the Idaho Supreme Court was not unconstitutionally vague. *See Creech*, 113 S. Ct. at 1544-45. The Court then remanded this case for further consideration. *See Beam*, 113 S. Ct. at 1837. We are of course bound by the Supreme Court's holding in *Creech* that the "utter

disregard" factor is not unconstitutionally vague. Thus, we proceed to an examination of another of the three aggravating factors.

B. The "Continuing Threat" Factor

We consider next whether the sentencing judge's application of the "continuing threat" aggravating factor – that the defendant "has exhibited a propensity to commit murder which will probably constitute a continuing threat to society" – was unconstitutional. During the sentencing proceedings, Judge Lodge found that Beam's "prognosis for any substantive rehabilitation is non-existent." *Beam*, 766 P.2d at 700. This finding in turn was based substantially on Beam's past non-violent, consensual or involuntary sexual conduct. *See id.* We must determine, therefore, whether the judge's reliance upon such past conduct in imposing a death sentence on Beam renders his application of the "continuing threat" factor violative of the Eighth Amendment.

1. Procedural Default

As a threshold matter, we must decide whether Beam fairly presented the claim that the trial court's application of the "continuing threat" aggravating factor was unconstitutional. If Beam has not, then he has procedurally defaulted this claim, and he must demonstrate cause and prejudice for the procedural default before a federal court may entertain the claim in a habeas proceeding.

[2] It appears that Beam has fairly presented his claim. It is true that the Idaho Supreme Court's opinion in

Beam's case never expressly refers to a constitutional challenge to the application of the "continuing threat" factor. However, in the brief he filed in that court on direct review. Beam challenged the Idaho death penalty statute as unconstitutionally arbitrary. By definition, that challenge would appear to require the court to consider whether the statutory "continuing threat" factor, as applied, was based upon arbitrary considerations, specifically upon considerations involving past conduct that are unrelated to any legitimate punitive purpose. Under this rationale the claim would not be defaulted, regardless of the fact that the Idaho Supreme Court did not expressly refer to it. *See Smith v. Digmon*, 434 U.S. 332, 333 (1978) (per curiam).

Even if Beam had failed fairly to present the claim to the state supreme court, under Idaho law he would still not have to demonstrate cause and prejudice. Idaho Supreme Court review of Beam's death sentence was conducted pursuant to Idaho Code § 19-2827. Under this provision, the Idaho Supreme Court has an affirmative duty to review the entire record in a capital case to determine, *inter alia*, whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." The state court must consider possible errors in sentencing that are not raised by the defendant or were not objected to at his trial. *See State v. Osborn*, 631 P.2d 187, 193 (Idaho 1981) ("[W]e may not ignore unchallenged errors. Moreover, the gravity of a sentence of death and the infrequency with which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below."). Indeed, the Idaho Supreme Court must review a

capital defendant's death sentence even if the defendant brings no appeal at all. *See id.* at 192-93.

At least six Western states in addition to Idaho have adopted some form of mandatory review as part of their death penalty procedures. *See* Ariz. R. Crim. P. 31.2(b); Cal. Penal Code §§ 1239(b), 1240.1(e)(1); Mont. Code §§ 46-18-307, 46-18-310; Nev. Rev. Stat. § 177.055; Ore. Rev. Stat. § 163.150(1)(g); Wash. Rev. Code §§ 10.95.100, 10.95.130. We have never considered the effect of any of these mandatory review provisions on a habeas petitioner's procedural default. We note, however, a distinction between the Idaho procedures and that of some of the other states. Idaho law established a mandatory review system in which the state supreme court is required to examine the record on its own initiative in order to determine whether certain specified types of errors occurred during sentencing. This review occurs even if the defendant himself raises no claims of such errors, *see Osborn*, 631 P.2d at 192-93. Because the reviewing court has statutory notice of the types of errors for which it is required to examine the record, it is presumed that it has carried out its statutory obligations even when it does not expressly indicate in its opinion that it has done so. As a result, the court's affirmance of the defendant's sentence after mandatory review constitutes at least an implicit rejection of claims of error that fall within its obligatory review even if the defendant has not raised those claims with specificity. Other states have

adopted mandatory review systems that differ in significant respects from Idaho's.[3]

Idaho is not the only Western state, however, to have adopted the requirement that its supreme court review death penalty sentences for specified types of error. Montana has mandatory review provisions that are identical in all relevant respects to Idaho's. In *Fitzpatrick v. State*, 638 P.2d 1002 (Mont. 1981), the state supreme court construed those provisions, and explained the effect to be given its affirmance of a death sentence in light of them. The court held that its affirmance of a capital sentence constitutes an implicit rejection of all specific claims falling within the subject of its mandatory review authority and that any claim covered by the mandatory review statute must be deemed resolved against the defendant even if he did not raise that claim before the court and even if the court failed to address it in its opinion. *See id.* at 1014. It further held that when the defendant raises such an issue on post-conviction relief, a court may rely on the earlier affirmance as an implicit rejection of the

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[3] For example, some other states have adopted procedures that may be better described as "automatic appeal" requirements rather than mandatory review ones. *See, e.g.*, Cal. Penal Code §§ 1239(b); 1240.1(e)(1). Under the automatic appeal type of procedure, the defendant is forbidden to waive his appeal to the state supreme court. *See Massie v. Sumner*, 624 F.2d 72, 74 (9th Cir. 1980), *cert. denied*, 449 U.S. 1103 (1981). However, the content of the appeal does not appear to be prescribed by statute, and affirmance by the court does not appear to require rejection of any particular claims on the merits. A procedural default arising from a failure to present a claim pursuant to this type of appellate process would raise different issues than are presented here.

contention (even though it was not raised by the defendant in the earlier appeal) and "need not review th[e] issue further." *Id.* We see no reason why the identical Idaho provisions would be construed any differently by the Idaho supreme court.

The United States Supreme Court considered the effect of state mandatory review provisions similar to Idaho's on procedural defaults in *Ake v. Oklahoma*, 470 U.S. 68 (1985). In *Ake*, the defendant had failed to raise the claim that he was entitled to assistance of a psychiatrist in his motion for a new trial. Oklahoma argued that this failure was an independent and adequate state ground for the denial of relief so that the Supreme Court lacked jurisdiction to review the claim. The Court disagreed. Under Oklahoma law, the state supreme court on direct review was required to examine the trail record for "fundamental error" – including all constitutional errors – notwithstanding the defendant's failure to properly raise them. According to the Court, this review rendered subsequent application of the procedural bar "depend[ent] upon an antecedent ruling of federal law." As a result, the state procedural bar was not "independent" of federal law and federal review was not precluded. *Id.* at 75. The court's rationale was that because "the state court must rule, either explicitly or implicitly, on the merits of the constitutional question," *id.*, at subsequent procedural bar would be a consequence of that court's failure to uphold the federal claim.

[3] Construed in light of the mandatory review provisions of § 19-2827, the Idaho Supreme Court's affirmance of Beam's death sentence necessarily included not only a determination that none of the claims Beam raised had merit but further that his sentence of death was not

based on any arbitrary factor. As reliance upon a petitioner's past non-violent, consensual or involuntary sexual conduct in violation of the Eighth Amendment would clearly constitute reliance on an arbitrary factor, *see infra* § II.B.2, the court "either explicitly or implicitly" concluded that the sentencing judge's application of the "continuing threat" aggravating factor did not violate the Eighth Amendment. Thus, here, as in *Ake*, application of the procedural bar depends upon an antecedent determination of federal law and does not constitute an independent and adequate state ground. Accordingly, Beam may challenge the application of the "continuing threat" aggravating factor in his federal habeas petition. *See Harmon v. Ryan*, 959 F.2d 1457, 1461 (9th Cir. 1992).[4]

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[4] We reject the State's argument that Idaho Code § 19-2719 barred the Idaho Supreme Court form conducting its own independent review of Beam's sentence pursuant to the requirements of Idaho Code § 19-2827. Section 19-2719 was enacted to consolidate all petitions for *state collateral relief* into a single state proceeding, along with the direct appeal. *See, e.g., State v. Card*, 825 P.2d 1081, 1086-87 (Idaho 1991), *cert. denied*, 113 S.Ct. 321 (1992). Section 19-2719 did not alter in any way, however, the Idaho Supreme Court's *independent duty* under section 19-2827 to review each death sentence and to determine whether the sentence was "imposed under the influence of passion, prejudice, or any other arbitrary factor." For example, the Idaho Supreme Court applied section 19-2827 in *Beam* itself, *see Beam*, 710 P.2d at 534, to reach issues not raised by the appellant. It is clear under Idaho law that section 19-2827 was not repealed or narrowed by section 19-2719. *See, e.g., State v. Hoffman*, 851 P.2d 934, 937, 943-45 (Idaho 1993) (applying both section 19-2719 and 19-2827); *Card*, 825 P.2d at 1086-87, 1094 (same); *State v. Paz*, 798 P.2d 1, 18-19 (Idaho 1990) (same), *cert. denied*, 111 S. Ct. 2911 (1991); *State v. Lankford*, 781 P.2d 197, 200-01 (Idaho 1989) (same), *cert. denied*, 497 U.S. 1032 (1990).

2. *Analysis*

In the trial court's Findings in Consideration of the Death Penalty, the finding that Beam posed a "continuing threat" to society followed immediately upon the finding that his "prognosis for any substantive rehabilitation is non existent." *See Beam*, 766 P.2d at 700.[5] We see no way to separate the two findings. By definition, any individual who cannot be rehabilitated is a continuing threat to society. It would strain credulity to conclude that the trial judge stopped after the first finding, wiped its contents form his mind, and started afresh when he made the succeeding finding. To the contrary, a reading of the entire document persuades us that the two findings are inextricably linked, and that the elements which led the court to reach the first conclusion formed a basis for the second as well. The first of the two findings – and thus the second also – was based in substantial part on the fact that "[t]he defendant has a long history of deviant sexual behavior, including incest, homosexuality, and abnormal sexual relationships with women both older and younger than the defendant." *See id.* Therefore, unless that sexual history constitutes an appropriate basis for a finding that underlies the imposition of the death penalty, the "continuing threat" factor cannot stand.

We now examine the question to which our analysis of the Findings in Consideration of the Death Penalty has

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[5] The trial court found Beam incapable of being rehabilitated in section nine of its aggravating-factor discussion in the death penalty findings. The court then found Beam to be a continuing threat to society in section ten.

led us – whether the trial court's application of the "continuing threat" aggravating factor is violative of constitutional principles. The court's finding amounted to a determination that Beam's prior sexual history, consisting exclusively of non-violent, consensual or involuntary conduct, provides a valid penological basis for separating him from other capital defendants and placing him in a small group for which death is appropriate. The court found, in effect, that an individual who has been the victim of incest,[6] has engaged in homosexuality, and has had "abnormal sexual relationships with women both older and younger" may be singled out for execution on the theory that he is a greater risk to society than most other first degree murderers. We conclude that the trial court's finding violates the Eighth Amendment to the Constitution.

Under the Eighth Amendment, a state may not make application of the death penalty depend upon a particular characteristic of the offense or the offender if selection of such a characteristic "makes no measurable contribution to acceptable goals of punishment." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality); *see Thompson v. Oklahoma*, 487 U.S. 815, 837-38 (1988) (plurality); *Tison v. Arizona*, 481 U.S. 137, 149 (1987); *Enmund v. Florida*, 458 U.S. 782, 798-801 (1982). As the Supreme Court noted in *Gregg v. Georgia*, 428 U.S. 153 (1976), "[t]he death penalty is said to

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[6] According to the presentence report, Beam's father forced Beam and his retarded older brother to have sex with Beam's mother while Beam's father watched. If anyone refused, Beam's father would beat the recalcitrant party. *See* Presentence Report, at 6, 8.

serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Id.* at 183 (joint opinion of Stewart, Powell, and Stevens, JJ.). In addition, the Court noted that the death penalty may also serve the purpose of the "incapacitation of dangerous criminals," *id.* at 183 n. 28, and has approved consideration of a defendant's future dangerousness, *see Jurek v. Texas*, 428 U.S. 262, 274-76 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Thus, before a state may base its decision to execute a defendant on a defendant's particular characteristics, the state must demonstrate that its reliance on such characteristics serves to further its interest in retribution, in deterrence, or in the elimination of those likely to kill again.

It is clear that using Beam's non-violent, consensual or involuntary sexual conduct as a basis for imposition of the death penalty serves no legitimate retributive purpose. The state may seek retribution only in relation to the blameworthiness of the actor in relation to the crime for which the state seeks to impose the death penalty. *See Tison*, 481 U.S. at 149. Although a capital defendant whose offense was motivated by a mercenary or racial animus might thereby be morally more culpable, *see, e.g., Barclay v. Florida*, 463 U.S. 939, 949 (1983) (plurality), no additional blame attaches to a capital defendant who has previously been the victim of incest, engaged in homosexuality, or had "abnormal" sexual relations with women of ages different than himself. Thus, regardless of whether such conduct is protected by the Fourteenth Amendment, the Eighth Amendment prevents the state from seeking retribution on the basis of Beam's prior sexual conduct. *Cf. Bowers v. Hardwick*, 478 U.S. 186, 197

(1986) (Powell, J., concurring) (noting that although homosexual sodomy was not protected under the Fourteenth Amendment, imposition of substantial punishment for engaging in such activity "would create a serious Eighth Amendment issue"). Simply put, a state may not use the death penalty as a mechanism for enforcing societal norms regarding sexual activity. *See, e.g.*, Note, Consitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex, 104 Harv. L. Rev. 1660, 1667-68 (1991) (discussing *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

Here, however, the state does not assert a retributive interest – or even a deterrent one – in Beam's sexual history but rather seeks to base a finding of future dangerousness on those events. When a state asserts a penological interest (here, future dangerousness) in conduct which it cannot punish directly, we must scrutinize its actions to ensure that they have an "appropriate relation to the safety of the state." *Herndon v. Lowry*, 301 U.S. 243, 258 (1937). Because the state may not impose the death penalty directly on the basis of a defendant's nonviolent, consensual or involuntary sexual conduct, we must determine whether, as it asserts, Beam's particular sexual history is sufficiently related to the state's interest in the elimination of persons likely to commit future capital crimes that imposition of the death penalty on this basis is constitutionally permissible.

In *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), the Supreme Court recently scrutinized Delaware's imposition of the death penalty based in part on the defendant's membership in a racist prison organization. The Court first noted the state could not impose punishment directly for membership in the organization but that this

prohibition does not necessarily preclude it from considering the defendant's membership if it is relevant to a permissible sentencing criterion. *See id.* at 1097-98. "[A]ssociational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society. A defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future." *Id.* at 1098.

The fact that associational evidence *might* be relevant to a defendant's future dangerousness was not, however, adequate to uphold its use in Dawson's case. The state had failed to introduce any evidence related to his membership that went beyond "mere abstract beliefs on Dawson's part" – belief shielded from punishment by the Constitution. *Id.* Because the state had failed to introduce evidence demonstrating a link between Dawson's membership and future harmful conduct, there was a substantial danger that the sentencer had considered his membership solely because it found that membership "morally reprehensible." For this reason, the Court said, if the state wished to rely on Dawson's membership in a racist prison organization, it was required to introduce evidence regarding that membership that went beyond abstract beliefs. *See id.*

We think the same is true when the state seeks to rely on a defendant's non-violent, consensual or involuntary sexual conduct as a basis for its decision to impose capital punishment. In such case, there is a substantial danger that the sentencer will be swayed by his own moral disapproval of the conduct and will not rationally and

impartially consider the relevance of the conduct to the defendant's future dangerousness. To ensure that the conduct is properly considered, the state must introduce more than the mere facts of the defendant's sexual history; specifically, the state must, at the least, introduce evidence demonstrating a close link between that history and the defendant's future dangerousness.

[4] In Beam's case, there was *no* evidence before the trial court supporting the existence of a link, close or otherwise, between the facts that he was the victim of incest, had engaged in homosexuality, or had had abnormal sexual relations with women of ages different than himself and the finding of future dangerousness. The psychological evaluation of Beam introduced in the sentencing hearing by the prosecution contains no suggestion that his sexual history indicated that he was likely to commit future violent acts. Nor does the presentence report draw a link between Beam's sexual experiences and a likelihood of future violence. Finally, there was no testimony to that effect during the hearing. In short, the trial judge's decision to draw a link between Beam's sexual experiences and future dangerousness was not based on any evidence of record.

[5] To the contrary, the link appears to be the product of the trial judge's arbitrary pre-conceived attitudes. Beam's presentence report demonstrates that, prior to the charged offense, he was the victim of abusive sexual conduct and not an abuser himself. His incestuous relationship with his mother was forced upon him by his father. The only other indication int he record of force or violence in his sexual relations with others was an alleged incident in which an older woman with whom he was

living supposedly "undressed him and tied him up [and] then brought ten girls to the house whereupon they all had sex with him." This incident is in all likelihood pure fantasy and in any event does not suggest that Beam was forceful or violent in his sexual behavior. In short, nothing in Beam's "long history of deviant sexual behavior" indicates a propensity for force or violence.

[6] It goes without saying that society has abandoned its earlier belief that homosexuality presents a danger to the community. It should also go without saying that victims of incest may not be further punished by making their misfortune the basis for their subsequent execution. As in *Dawson*, the danger here is too great that the sentencer merely found the behavior "morally reprehensible." After reviewing the record, we are left with the firm conviction that the state court's finding on which it based its application of the "continuing threat" aggravating factor was simply the product of the court's moral disapproval of Beam's sexual experiences. We do not believe the Eighth Amendment permits the state to send a man to his doom for such a reason.

3. *Retroactivity*

The Supreme Court's holding in *Teague v. Lane*, 489 U.S. 288 (1989), does not bar our conclusion that the trial court's application of the "continuing threat" aggravating factor violated the Eighth Amendment. Our holding that invalidates the state court's incapacitation rationale for Beam's death sentence, *see supra* pp. 12931-36, is based upon the rule established in *Herndon v. Lowry*, 301 U.S. at 258, which was announced nearly 50 years before Beam's

state collateral attack became final.[7] As the Supreme Court has recently noted, a rule is not "new" simply because it is applied to a set of different facts. *See Stringer v. Black*, 112 S. Ct. 1130, 1135-40 (1992); *Wright v. West*, 112 S. Ct. 2482, 2499 (1992) (Kennedy, J., concurring) ("If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule."). Because we simply applied the general *Herndon* rule to the specific facts of this case, we conclude that our holding does not create a "new" rule. Moreover, the issue before us involves the substance of the criminal law, not a rule of criminal procedure. *See United States v. Sood*, 969 F.2d 774, 775 (9th Cir. 1992) ("*Teague*, however, dealt with the retroactive application of a new constitutional rule of criminal procedure, not with the application of decisions affecting the substance of criminal laws. This court has recognized the distinction." (internal quotes omitted)).

Furthermore, even if our application of *Herndon* were "new," *Teague*'s bar against the application of new rules on a writ of habeas corpus does not apply to "rules forbidding criminal punishment of certain primary conduct" or "rules prohibiting a certain category of punishment for a class of defendants because of their statues or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). The

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[7] As we mentioned above, *Herndon* stands for the proposition that any limitation upon individual liberty – for example, liberty from cruel and unusual punishment – must have an "appropriate relation to the safety of the state." *Id.*

state's interest in finality is not unduly hindered by retroactive application of such rules because " '[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.' " *Id.* (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (opinion of Harlan, J.)).

Our Eighth Amendment holding in Beam's case falls squarely within both parts of the exception quoted above. With respect to the first part, our holding clearly forbids "criminal punishment of certain primary conduct" – namely criminal punishment of non-violent, consensual, or involuntary past sexual acts. This conduct is precisely the kind of "private individual conduct" that is beyond the power of the state to proscribe through the death penalty. *Teague*, 489 U.S. at 307 (plurality opinion) (quoting *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.)).[8] Where the death penalty is based in part on that conduct, the first part of the exception is applicable.[9] With respect

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[8] *Butler v. McKellar*, 494 U.S. 407, is not to the contrary. There, the Court held that the "primary conduct" exception to *Teague* was inapplicable because the "new" rule in that case – involving *Miranda* warnings – did not forbid criminal punishment for any primary conduct on the part of the petitioner. *Id.* at 415. By contrast, the "new" rule in this case clearly forbids criminal punishment for "certain primary conduct" on the part of the petitioner – namely his non-violent, consensual, or involuntary past sexual acts.

[9] *Bowers v. Hardwick*, 478 U.S. 186 (1986), is not to the contrary. *Hardwick* held that there is no fundamental right to engage in sodomy under the substantive Due Process Clause. However, the Court left open the possibility that punishment for such acts would violate the Eighth Amendment. *See id.* at 197 (Powell, J., concurring) ("In my view, a prison sentence for [sodomy] –

to the second part, the Supreme Court has prohibited retroactive punishment based upon an individual's status, *see, e.g., Penry*, 492 U.S. at 330 (mental retardation); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (insanity), or his offense, *see, e.g., Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (rape). Like those cases, our holding also simply prohibits "a certain category of punishment," i.e., the death penalty, "for a class of defendants because of their status or offense," i.e., where the penalty is based in part on the type of sexual practices we have described.

4. The Remedy For the State's Unconstitutional Action

Under Idaho law, the state court in a capital case determines the appropriateness of the death penalty in a particular case by weighing the aggravating circumstances against the mitigating ones. *See* Idaho Code § 19-2515.[10] When the death penalty has been imposed as a result of such a weighing process, the subsequent elimination as invalid of one of the aggravating factors alters the balance and, as a result, renders the state court's prior determination that death is the appropriate penalty unreliable. *See Clemons v. Mississippi*, 494 U.S. 738, 751 (1990). Thus, our determination that an aggravating factor relied on by the Idaho court was unconstitutional as applied

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certainly a sentence of long duration – would create a serious Eighth Amendment issue."). Because our holding is based on the Eighth Amendment, *Hardwick* is not applicable.

[10] As we subsequently explained in *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993), Idaho Code § 19-2515(c) requires each aggravating factor to be weighed seperately against all mitigating factors. *See Fetterly*, 997 F.2d at 1297 (discussing *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299 (1989)).

would ordinarily require us to vacate the death sentence. *See Creech*, 947 F.2d at 885, *vacated on other grounds*, 113 S. Ct. 1534 (1993).

In this case, however, the trial court also found that, as a result of Beam's poor chances of rehabilitation, "any one of the aggravating circumstances found by this Court to exist outweighs the mitigating circumstances." The state argues that this additional finding requires us to uphold Beam's death sentence even if the state court's application of one of the aggravating factors was unconstitutional. The additional finding, however, is subject to the identical constitutional objection that required us to invalidate the "continuing threat" determination. The additional finding, like the "continuing threat" determination, was founded upon the court's impermissible reliance upon Beam's past non-violent, consensual or involuntary sexual conduct, *see, e.g., Beam*, 766 P.2d at 700 (discussing Beam's "non-existent" prognosis for rehabilitation); discussion *supra* § II.B.2. Thus, we conclude that the additional finding also violates Beam's rights under the Eighth Amendment.

[7] In sum, the trial judge's finding that Beam's sexual history demonstrated that there was no possibility of rehabilitation is invalid. As that finding served as a basis for the court's conclusion that any one aggravating circumstance would outweigh all of the mitigating circumstances, that conclusion is also invalid. The only other basis on which the state court determined that Beam deserved the death penalty was its finding that all three aggravating circumstances, when combined, outweighed

all the mitigating ones. However, we have already determined that, when weighing all the aggravating and mitigating factors together, the state court impermissibly applied the "continuing threat" aggravating circumstance. Accordingly, we cannot rely on the balancing of aggravating and mitigating circumstances performed in Beam's case, and his death sentence – which resulted from an invalid weighing of factors – must be vacated. *See Creech*, 947 F.2d at 885, *vacated on other grounds*, 113 S. Ct. 1534 (1993).[11]

Conclusion

We affirm, for purposes of this appeal, the district court's denial of Beam's claim that the use of the dual jury system violated his constitutional rights. We reverse the district court's conclusion that the trial court's application of the "continuing threat" aggravating factor used in Beam's sentencing was not unconstitutional. We remand the case to the district court and direct it to grant the petition on the ground that the state trial court committed constitutional error when it improperly found an aggravating circumstance based upon Beam's non-violent, consensual or involuntary sexual history and then

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[11] Beam also claims Judge Lodge was incapable of objectively considering his sentencing claims and that this denied him his constitutional right to an impartial judge both at sentencing and at the time of his post-conviction hearing. Because we vacate Beam's sentence on other grounds, we need not reach this claim. We note however, that Beam would be free to reassert this claim were Judge Lodge to preside over his resentencing. We decline to consider the claim in advance only because Judge Lodge has left the state bench.

concluded that, as a result of his poor chances of rehabilitation, any single aggravating circumstance would be sufficient to outweigh all mitigating circumstances. The sentence will be vacated, and the state court will conduct new sentencing proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT RAY BEAM Petitioner-Appellant, v. DAVID PASKETT, Warden, Idaho State Prison-Boise Respondent-Appellee.	No. 90-35616 D.C. No. 86-1114 ORDER (Filed Dec. 6, 1993)

Before: D.W. Nelson, Boochever and Reinhardt, Circuit Judges

The panel has voted to deny the petition for rehearing. Judges D.W. Nelson and Reinhardt have voted to reject the suggestion for rehearing en banc, and Judge Boochever so recommends. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.